

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

REX L. POPE,

Petitioner,

v.

JEFFREY A. UTTECHT,

Respondent.

CASE NO. C14-5497 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION AND
DENYING PETITIONER'S
MOTION TO EXPAND THE
RECORD

This matter comes before the Court on the Report and Recommendation ("R&R") of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 19), Petitioner Rex Pope's ("Pope") objections to the R&R (Dkt. 20), and Pope's motion to expand the record (Dkt. 21).

On January 9, 2015, Judge Strombom issued the R&R recommending that the Court deny claims 1 and 3 of Pope's petition on the merits and dismiss count 2 as unexhausted and procedurally barred. Dkt. 19. On January 30, 2015, Pope filed objections and a motion to expand the record. Dkts. 20 & 22.

1 **A. Objections**

2 The district judge must determine de novo any part of the magistrate judge's
3 disposition that has been properly objected to. The district judge may accept, reject, or
4 modify the recommended disposition; receive further evidence; or return the matter to the
5 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

6 With regard to claims 1 and 3, the Court agrees with Judge Strombom that Pope
7 has failed to meet the high burden of showing that the state court opinion was an
8 unreasonable application of Supreme Court law. Pope provides numerous facts regarding
9 the underlying trial and his Parkinson's disease, but he fails to provide any argument that
10 the state court unreasonably applied binding Supreme Court precedent that governs his
11 claims for relief. Therefore, the Court denies Pope's objections as to the merits of claims
12 1 and 3.

13 With regard to claim 2, Pope does not dispute that this claim is procedurally
14 barred. Pope, however, does contend that the Court should excuse the procedural default
15 because he is actually innocent. Dkt. 20 at 6-9. While Pope cites numerous cases on the
16 issue of actual innocence, Pope fails to articulate any reason why he is actually innocent
17 of these crimes other than his own opinion. This is insufficient evidence to establish
18 actual innocence. Therefore, the Court denies the objections.

19 **B. Motion to Expand**

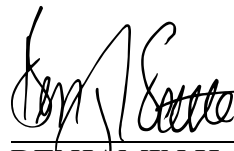
20 Pope moves to expand the record so that the Court will accept and consider
21 evidence of Pope's health conditions. Dkt. 21. Respondent contends that Pope has failed
22 to articulate how the current record is insufficient. Dkt. 23. The Court agrees with the

Respondent because the state court addressed and rejected Pope's argument. Specifically, the state court concluded that "[n]othing in the medical records showed that Pope could not commit an assault during this attempted theft of a motor vehicle, and he has not identified any expert witness that would so testify." Dkt. 16, Exh. 2. Currently, Pope again fails to identify any specific evidence or expert testimony that establishes the factual predicate that he could not have committed the charged assault. Therefore, the Court denies Pope's motion.

The Court having considered the R&R, Pope's objections, and the remaining record, does hereby find and order as follows:

- (1) The R&R is **ADOPTED**;
- (2) Pope's motion to expand the record (Dkt. 21) is **DENIED**;
- (3) Pope's petition is **DENIED** as to claims 1 and 3, and **DISMISSED** as to claim 2;
- (4) The Court **DENIES** a Certificate of Appealability; and
- (5) This action is **DISMISSED**.

Dated this 16th day of March, 2015.



BENJAMIN H. SETTLE
United States District Judge